STATE OF MINNESOTA
IN COURT OF APPEALS
A09-218

State of Minnesota,
Respondent,

vs.

Paul Peter Wedel,
Appellant.

Filed December 21, 2010
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-07-10766

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Robert D. Miller, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from convictions of two counts of first-degree criminal sexual conduct and from an order denying appellant's petition for postconviction relief,

appellant argues that he received ineffective assistance of counsel and that the evidence is insufficient to support the convictions. We affirm.

FACTS

N.A. and D.A. are sisters and are the youngest of their family's five children. At night on August 18, 2007, N.A. and D.A. went into the room of their sister M.A., who was 12 at the time of trial, and told her that appellant Paul Peter Wedel had inappropriately touched them when they were at his home. N.A. and D.A. were both visibly upset during this conversation. The next morning, M.A. brought her sisters to the Brooklyn Center Police Department. While there, M.A. met with Officer Robert Traxler. M.A. told Traxler that both of her sisters had stated that appellant performed oral sex on them the last time they were at his home. Traxler only spoke to M.A. and never interviewed N.A. or D.A. about the alleged sexual abuse.

On August 30, 2007, N.A. and D.A. were each separately interviewed by staff at Cornerhouse, an interagency child-abuse evaluation center. The interviews were videotaped, and the tapes were shown to the jury at trial.

During N.A.'s interview, N.A. stated that when she and D.A. were at appellant's house watching television, appellant pulled up D.A.'s shirt, touched D.A.'s chest, and then did the same thing to her. N.A. also told her interviewer that on that same day, she was sleeping in appellant's grandma's bed by herself, when appellant came in the room, pulled off her underwear, and touched her in her "pee pee spot." Also, in response to questions about when these incidents occurred, N.A. stated: (1) it was all the same day (referring to the day they told M.A.); (2) it was all the same day (referring to Tuesday);

and (3) he only "gave touches" one day, but six lines later, N.A. stated "actually they was on four days."

During her interview, D.A. stated that appellant tried to make her and N.A. touch his "pee pee" with their lips. She also stated that she saw appellant touch N.A. in the "pee pee spot" and "licking her pussy" and that the appellant also "licked my pussy" and "was touching my booty." When the interviewer asked D.A. if all the stuff with appellant happened on one day or more than one day, D.A. answered that it was "[m]ore than one day." D.A. also told the interviewer that the last time something had happened was on a Thursday and that, during the last time, appellant put a glove on his "pee pee" and tried to put his "pee pee" into their vaginas. She told the interviewer that after that time, she and N.A. did not go over to appellant's again and that, after a couple of days, they went and told M.A.

Appellant was charged with two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2006) (sexual penetration with another when complainant is under 13 years of age and actor is more than 36 months older than complainant); and two counts of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2006) (sexual contact with another when the complainant is under 13 years of age and actor is more than 36 months older than the complainant). The complaint originally alleged that these crimes occurred between August 1 and August 16, 2007. But, based on evidence that was presented during trial, the complaint was amended to allege that the crimes occurred between August 1 and August 18, 2007.

At the time of trial, N.A. was seven years old, and D.A. was nine years old. N.A. testified at trial that while she was at appellant's house watching a movie, appellant took her clothes off and touched her "pussy" (N.A.'s word for vagina) with his hand and then later with his tongue. She also testified that she saw appellant do the same thing with D.A. and that, afterwards, she and D.A. went home and told M.A. what had happened. N.A. stated that she had never seen the parts of appellant's body.

On cross-examination, N.A. stated that she told M.A. about these things the same day that the incident occurred. N.A. also testified on cross-examination that appellant never (1) showed her his penis, (2) put his penis in her mouth, or (3) made her kiss his penis. N.A. was also asked if appellant ever touched her "pussy" with his penis, to which she responded, "No, he only touched it with his hand." When asked where these incidents occurred, N.A. stated that all of the touching occurred in appellant's bedroom. N.A. also stated that she could no longer remember whether all of these incidents happened on one day.

D.A. testified at trial that appellant touched her vagina with his hand and with his tongue and that she saw appellant touch N.A. in the same places. D.A. also testified that appellant made her touch his "ding-dong." When asked whether she still remembers everything that happened, D.A. stated that she remembers appellant touched her on lots of days, not just one, and that all of the touching happened at appellant's house in his bedroom. On re-cross-examination, D.A. stated that some of the touching had occurred at her house.

The jury found appellant guilty as charged, and the district court imposed concurrent sentences of 144 months and 168 months on the first-degree criminal sexual conduct convictions. This appeal followed.

D E C I S I O N

I.

To prevail on an ineffective-assistance-of-counsel claim, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). A court "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

Under the first prong, "an attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotation omitted). "There is a strong presumption that an attorney acted competently." *Id*. Decisions about "[w]hat evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Courts

must distinguish between the professional performance of counsel and these tactical decisions. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). It is not an appellate court's function to second guess counsel's tactical decisions involving trial strategy with the benefit of hindsight. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003).

Under the second prong, "to show prejudice, the defendant must undermine confidence in the trial outcome by demonstrating that but for the errors the result of the proceeding probably would have been different." *Williams v. State*, 764 N.W.2d 21, 30 (Minn. 2009). "The reviewing court considers the totality of the evidence before the judge or jury in making this determination." *Rhodes*, 657 N.W.2d at 842.

Appellant argues that his trial counsel was ineffective because counsel failed to (1) pursue an alibi defense; (2) use the alibi defense to impeach the state's witnesses; (3) subpoena the victims' mother; and (4) object to the amended complaint.

Alibi defense

Appellant contends that his trial counsel was ineffective because his counsel should have called witnesses to provide an alibi for August 16, 2007. "'Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of trial counsel. Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight.'" *Scruggs v. State*, 484 N.W.2d 21, 26 (Minn. 1992) (quoting *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986)). Consequently, because appellant's claimed error pertains to a matter of trial strategy, appellant is not entitled to relief on this ground. Furthermore, there is no

reasonable probability that the outcome of appellant's trial would have been different but for counsel's alleged error.

Appellant claims that his trial counsel's failure to raise an alibi defense for August 16 affected the outcome of the proceeding because he "couldn't have committed the crimes alleged at trial if he was somewhere else at that time." But the amended complaint alleged that the criminal conduct occurred between August 1 and August 18, 2007. As the postconviction court noted, even "[i]f [appellant] established an alibi for August 16, 2007, it would not provide an alibi for the remaining seventeen days [the state] alleged the criminal conduct occurred. Given the plethora of time for which [appellant] did not have an alibi, it is not reasonable to assume that the presentation of an alibi for August 16, 2007, would change the outcome of trial." Thus, appellant's ineffective-assistance claim fails on this ground.

Use of alibi for impeachment

Appellant contends that he received ineffective assistance because "had trial counsel . . . used the alibi defense to impeach the state's witnesses in this case, it is fair to conclude that the outcome would have been different." But appellant does not explain how the outcome of the trial would have been different if his trial counsel had used his alleged alibi for August 16 on cross-examination. Assignments of error in a brief based on mere assertion and unsupported by argument or authority are deemed waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). Furthermore, decisions about the manner of cross-examination and which issues to present to the jury concern matters of trial strategy, and, as such, are not subject to review. *State v. Miller*, 666 N.W.2d 703, 716-17

(Minn. 2003); *Jones*, 392 N.W.2d at 236; *see also State v. Irwin*, 379 N.W.2d 110, 115 (Minn. App. 1985) (noting that manner of cross-examination is tactical decision and that "failure to conduct cross-examination in a certain manner" does not demonstrate ineffective assistance), *review denied* (Minn. Jan. 23, 1986). Thus, appellant has not demonstrated that he is entitled to relief on this ground.

Failure to subpoena the victims' mother

Appellant contends that "the mother's testimony that her daughter has lied in the past about sexual issues adds to the conclusion that trial counsel's performance (trial strategy) was unreasonable, and that there was a reasonable probability that the outcome of the trial would have been different had the jury heard this evidence."

Decisions about which witnesses to call at trial are matters of trial strategy and are not subject to review. *Jones*, 392 N.W.2d at 236. Therefore, to prevail on this claim, appellant must show that his trial counsel's failure to subpoena the victims' mother was so patently erroneous that it could only have been ineffectiveness of counsel and not a trial strategy. *See State v. McLane*, 346 N.W.2d 688, 690 (Minn. App. 1984) (stating that to prevail on ineffective-assistance claim based on failure to challenge search warrant, which is trial tactic, "defendant must show that the search warrant so patently lacked probable cause that the failure to challenge it could only have been ineffectiveness of counsel and not trial tactics").

At the postconviction hearing, appellant's trial counsel testified that he did not call the victims' mother to testify because (1) she "appeared not to be real sympathetic with [appellant's] case"; (2) he was concerned about "where the prosecution was going to go

with their case" and "was fearful that an argument could be made that these children didn't have the type of supervision required, and that this would be the type of situation that could be easily taken advantage of"; and (3) he did not "think she was going to say it didn't happen." Because this testimony demonstrates that the decision to not have the victims' mother testify was a matter of trial strategy within the discretion of trial counsel, appellant's ineffective-assistance claim fails on this ground.

In addition, appellant does not explain what testimony the victims' mother could have provided that probably would have changed the outcome of the proceeding. *See State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (stating that a defendant has an affirmative obligation to show that a witness's testimony would have made a difference in the outcome of the proceeding). Although appellant claims that the victims' mother would have testified that "her daughter has lied in the past about sexual issues," the daughter referred to in this statement is M.A., who is not one of the victims in this case.

Furthermore, "[b]efore evidence of prior false accusations is admissible, . . . the [district] court must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993) (holding that evidence concerning prior accusations of rape is only relevant to complainant's credibility when there has first "been a determination that the prior accusations were indeed fabricated"), *review denied* (Minn. Oct. 19, 1993). The record does not indicate whether a threshold determination of falsity has ever been made, and appellant makes no argument and cites no authority establishing the admissibility of this testimony. Assignments of error based on mere assertion and unsupported by

argument or authority are deemed waived unless prejudicial error is obvious. *State v. Quick*, 659 N.W.2d 701, 718 (Minn. 2003). Because prejudicial error is not obvious, appellant's ineffective-assistance claim also fails on this ground.

Amended complaint

In a pro se supplemental brief, appellant argues that his trial counsel was ineffective because he did not object to the amended complaint. Appellant contends that his trial counsel's failure to object to the amended complaint fell below an objective standard of reasonableness because the amended complaint "expanded the possible dates of the alleged abuse from one day to eighteen days." Appellant claims that "[b]y agreeing to an 18 day period of time in which the sexual abuse could have occurred, the trial counsel prejudiced a substantial right of the Appellant to present an alibi for the date of the alleged molestation." But the original complaint alleged that the crimes occurred between August 1 and August 16, 2007. Thus, the amended complaint expanded the possible dates of the alleged abuse from 16 days to 18 days, not from one day to 18 days.

In sexual abuse cases, "there is generally no requirement that specific dates be charged, or proven." *State v. Eggert*, 358 N.W.2d 156, 160 (Minn. App. 1984) (citing *State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984)). "Where the date is not the essential element of the crime the [district] court may properly allow an amendment of the complaint so it comports with evidence presented at trial." *Ruberg v. State*, 428 N.W.2d 488, 490 (Minn. App. 1988), *review denied* (Minn. Oct. 26, 1988). "[I]n order to prejudice the substantial rights of the defendant, it must be shown that the amendment

either added or charged a different offense." *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982).

The amendment to the complaint did not add or charge a different offense. It only changed the time period during which the alleged criminal conduct occurred to conform to the evidence presented at trial. Because the amendment did not add or charge a different offense, appellant's substantial rights were not prejudiced, and any objection by counsel would have been meaningless. "An attorney's failure to make a meaningless objection does not give rise to a claim of ineffective assistance of counsel." *State v. Rainer*, 502 N.W.2d 784, 789 (Minn. 1993). Therefore, appellant is not entitled to relief on this ground.

II.

In the pro se supplemental brief, appellant argues that the evidence was insufficient to support his convictions. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). In evaluating the reasonableness of the jury's decision to convict, this court defers to the jury on the issues of witness credibility

and the weight to be assigned each witness's testimony. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Appellant claims that the evidence was insufficient because N.A.'s and D.A.'s testimony contained several inconsistencies and contradictions. But inconsistencies in the prosecution's case do not require reversal. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). A "jury is free to accept part and reject part of a witness's testimony." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). And the jury has the exclusive function of weighing witness credibility at trial. *See State v. Reichenberger*, 289 Minn. 75, 78-80, 182 N.W.2d 692, 694-95 (1970) (affirming conviction of carnal knowledge of a child, even when the victim made conflicting statements before trial, because she testified positively at trial that intercourse had occurred); *State v. Erickson*, 454 N.W.2d 624, 625, 629 (Minn. App. 1990) (stating that when child victim's accounts of sexual abuse changed over time, credibility was for the jury to resolve), *review denied* (Minn. May 23, 1990); *State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (stating that when child victim told officer she was sexually abused by defendant on five or more occasions but testified at trial to only three incidents, inconsistency was for jury to consider in weighing victim's credibility).

A person is guilty of first-degree criminal sexual conduct if the person "engages in sexual penetration with another person" and "the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." Minn. Stat. 609.342 subd. 1(a). "Sexual penetration" includes "any intrusion however slight into the genital or anal openings." Minn. Stat. § 609.341, subd. 12(2) (2006). A victim's testimony of

sexual abuse is sufficient evidence to satisfy the elements of first-degree criminal sexual conduct. *See State v. Schwab*, 409 N.W.2d 576, 579 (Minn. App. 1987).

At trial, N.A. and D.A. each testified that appellant took off her clothes and touched her vagina with his hands and with his tongue. Also, both girls were shaking and N.A. was crying when they first told M.A. what had happened to them. *See State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (stating that "significant corroborating evidence" of a sexual assault may include "testimony by others as to the victim's emotional condition at the time she complained"). Viewing this evidence in the light most favorable to the convictions, and assuming that the jury believed the state's witnesses and disbelieved contrary evidence, the jury could have reasonably concluded that appellant was guilty of the offenses charged. Thus, the evidence against appellant was sufficient to support the convictions.

Affirmed.